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JAMES

No. 536

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, Petitioner,

vs

GERALDINE GAVAGAN, ET AL., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

RESTATEMENT OF QUESTION PRESENTED

Whether the United States is liable under the Federal Tort Claims Act for the deaths of respondents' decendents, upon findings that such deaths were caused by the negligent acts and omissions of employees of the United States while acting within the scope of their employment by member agencies of the National Search and Rescue Plan during the course of

a search and rescue effort conducted under the direction of the Rescue Coordination Center (manned by Coast Guard personnel) at Miami, Florida.

STATEMENT

Respondents' causes of action and the judgments for respondents upon those causes of action are not based on negligence of the crews of the Coast Guard vessels which were assigned to the rescue effort, but on the negligent acts and omissions of the Government's employees who were assigned duties in directing the rescue effort, in searching for and effecting a rendezvous with the fishing vessel, DONALD RAY, of which respondents' decedents were master and crew, and in communicating information in the rescue effort, as follows:

1. The employees of the Government who manned the SAR plane, DUMBO 1. Their mission was to locate the DONALD RAY and "get the word back to our home station as to what condition we think it's in; what we need; and try to get somebody in the vicinity, if we can't land, and direct some boat . . . passing messages back and forth to the ship or Coast Guard or whoever we are in contact with." (R. 420.

2. The employees of the Government at NAS Jacksonville who manned the open telephone line (R. 581) between NAS Jacksonville and RCC Miami and whose duty was to receive messages from the SAR plane, DUMBO 1, and transmit the information so received to RCC Miami.

3. The employees of the Government who manned the Coast Guard Radio Station, Jacksonville Beach, and whose duty was to receive and transmit messages in respect to the rescue efforts, and

4. The employees of the Government who manned RCC Miami and whose duty was to receive and evaluate infor-

mation in respect to the rescue effort and to direct and coordinate the operations of the units and facilities assigned to and available for that purpose.

The District Judge found, upon evidence amply justifying the findings, that these Government employees were negligent in nine respects particularly set out in paragraph 11 of the findings, as follows:

"(a) In failing to properly evaluate and utilize the available information with respect to the location and movement of the DONALD RAY.

"(b) In failing to listen and take a direction finder fix upon the DONALD RAY while she was still able to broadcast on her radio.

"(c) In failing to consider and treat the situation as one of distress and emergency after the DONALD RAY had been located dead in the water 15 to 18 miles from the coast.

"(d) The personnel operating the Navy aircraft were negligent in reporting at the time they located the DONALD RAY that a Coast Guard vessel was approaching the DONALD RAY and when that erroneous report was corrected by the personnel of the Navy aircraft approximately five minutes later, the personnel at the Naval Air Station, Jacksonville, were negligent in failing to promptly notify the Rescue Coordination Center that the report of a vessel approaching the DONALD RAY was erroneous.

"(e) The personnel operating the naval aircraft were negligent in reporting that the DONALD RAY was not in immediate danger.

"(f) The Rescue Coordination Center personnel were negligent in relying upon the report of the Navy plane that a Coast Guard vessel was approaching the DONALD RAY.

They knew, or should have known, that neither the Coast Guard 83 footer nor the SWEETGUM was near the reported position of the DONALD RAY.

"(g) In failing to issue an emergency broadcast to merchant ships in the area of the DONALD RAY after she had been located.

"(h) In failing to alert the HENRY M. DAWES to the distressed condition of the DONALD RAY until after she had proceeded to a point considerably south of the DONALD RAY'S position.

"(i) In failing to notify the shrimpers at Mayport that the Coast Guard 83 footer was returning to base and that the SWEETGUM could not reach the DONALD RAY before 9:00 P.M. and in failing to utilize the services of those shrimpers who were ready and willing to aid in the rescue."

R. 1001-1002.

The significance of the negligent acts and omissions so found by the District Judge may be better understood by consideration of these basic facts and considerations:*

1. The facilities and personnel available under the National Search and Rescue Plan became committed to the rescue effort when RCC, Miami, at 9:15 A. M., EST, directed the Coast Guard 83-footer to proceed (R. 1062, 1080). The negligent acts and omissions relied on occured after RCC, Miami became committed to undertake the rescue and while RCC Miami was directing the rescue effort.

2. At 9:34 A. M., EST, RCC, Miami, issued an all-ships broadcast (R. 1063, 1082, message 081432Z). The directions

*The sequence of events can be more readily understood by reference to the chart included as an Appendix to this Brief.

by RCC Miami to Coast Guard Radio Station Jacksonville were: "FOR ONE EMERGENCY AND THEN REPEAT IN FIFTEEN MINUTES ALL SHIPS X FLORIDA X EAST COAST X JACKSONVILLE X ALL SHIPS IN THIS AREA KEEP LOOKOUT FOR SHRIMPER DONALD RAY X REPORTED SINKING IN APPROX POSIT 30-06 N 80-35W" (R. 1082). This message was broadcast at 9:55 A.M. and 10:10 A.M. on 440 kilocycles after first giving the International Urgency Signal on 500 kilocycles (R. 1019) and at 10:24 A.M. on 2678 kilocycles after first giving the International Urgency Signal on 2182 kilocycles (R. 1019, 1027). The approximate position of the DONALD RAY so broadcast, 30-06 N 80-35 W, was many miles -- 30 minutes of longitude -- east of the position -- 30-07 N 81-05 W -- in which the DONALD RAY was found by DUMBO I at 4:14 P.M. EST (R. 1033, 1037, entry 2144Z). No correction of the earlier reported position of the DONALD RAY was made by a similar "all-ships" broadcast following location of the DONALD RAY.

3. At the time DUMBO I located and reported locating the DONALD RAY, the Coast Guard's 83-footer had been instructed to take shelter and was returning to port (see message P 081815Z, R. 1093, originated at 1:14 P.M. EST). And, with respect to the SWEETGUM the District Judge found:

> The SWEETGUM was proceeding easterly from her 3:34 P.M. Eastern Standard Time position at 30-07 N 80-32 W. By message originated at 5:10 P.M., the SWEETGUM advised her estimated time of arrival at the position of the DONALD RAY at 9:00 P.M. Eastern Standard Time. Although the SWEETGUM did not advise shore stations of her position at 3:34 P.M. Eastern standard Time, she did advise them at 3:12 P.M. Eastern Standard Time, that she was extending the search area to 55 miles ESE of St. Johns

> Bar and the shore stations, from the information reported by the SWEETGUM, should have known that she was nowhere near the reported position in which the DONALD RAY was found."

R. 995.

4. Shortly prior to the location of the DONALD RAY, the tanker HENRY M. DAWES left St. Johns Bar bound for Baytown, Texas, on a course which was to take her within approximately five miles of the position in which the DONALD RAY was found. As found by the District Judge:

> "The Captain of the Port's office, Jacksonville, [staffed and operated by Coast Guard personnel] received from its Harbor Entrance Patrol craft patrolling the entrance to the St. Johns River reports of the arrival and departure of each vessel arriving or departing the St. Johns Bar. Routinely, the harbor entrance patrol craft reported the departure of the HENRY M. DAWES."

R. 998.

From the time the HENRY M. DAWES departed St. Johns Bar at about 4:00 P.M. EST she was guarding 500 kilocycles for the purpose of receiving such emergency messages as might have been broadcast. Had the personnel of the Coast Guard Radio Station, Jacksonville Beach, broadcast an emergency message to all ships on 500 kilocycles when the position of the DONALD RAY was established, such message would have been received by the DAWES. As further found by the District Judge, however,

> "No information with respect to the distress of the DONALD RAY was communicated to the HENRY M. DAWES until after she was reached by the Coast Guard Radio Station, Jacksonville Beach, at 6:22 P.M.

Eastern Standard Time."

R. 998

5. The circumstances of informing the HENRY M. DAWES of the DONALD RAY'S distress were accurately summarized by the District Judge as follows:

> "At 5:36 P. M., Eastern Standard Time, the Navy aircraft reported to the Coast Guard Radio Station, Jacksonville Beach, that there is a large ship about five miles heading south from fishing vessel. The radio station operator suggested that the plane give the name of the vessel, to which the plane replied that it would probably lose contact with the fishing vessel. Coast Guard Radio Station, Jacksonville Beach, said: 'We will make every effort to contact him.' This was at 5:37 P. M., Eastern Standard Time. However, no effort was made by the Radio Station to call the ship until 6:20 P. M., Eastern Standard Time after the vessel had been identified as the HENRY M. DAWES. This identification was made by a Navy plane from Sanford at the request of the SAR plane, DUMBO 1."

R. 996, 997

6. When the HENRY M. DAWES was finally reached at 6:20 P. M., EST, it was approximately 12 or 13 miles south of the position of the DONALD RAY (R. 1210, 1213). When notified of the distress situation and requested to do so, the master of the vessel HENRY M. DAWES turned his vessel around and proceeded to the position given by the Coast Guard Radio Station. The DAWES was being navigated by the use of Loran equipment by which accuracy of positions was obtainable within a "matter of tenths of a mile" (R. 1219). The master of the DAWES testified by deposition that he arrived at the position where the DONALD RAY had been

reported to him in approximately an hour after he had turned his vessel around and before it became dark (R. 1213, 1214). He said that "when we arrived at the position he gave us, we contacted them and they said to stand by a second, that they had a revised position" (R. 1195). According to the Coast Guard Radio Station Log, at about 8:00 o'clock P. M. the DAWES asked the Radio Station "I wonder if you could get the plane to give us a better position of F/V (fishing vessel)." The Radio Station then gave the DAWES a new position"--30.04 North, 80.53 West, to which the DAWES replied: "We are 7 - miles from vessel" (R. 1045). It will be observed that the new position was 12 minutes of longitude east of the position first given by the Coast Guard Radio Station to the HENRY M. DAWES (30.06 N, 81.05 W; R. 1041, entry 2335Z). The DAWES then proceeded to the position where the relieving plane, designated "CARDFILE," was maintaining flares on the water. This position, according to the DAWES, was 30.00.5 North, 80.48 West, five minutes of longitude east of the last previously reported position. There the DAWES found two flares on the water. This information was communicated by the DAWES to the Coast Guard Radio Station, Jacksonville Beach, at 9:15 P. M., EST (see entry 0215Z, R. 1049).

There can not be the slightest doubt of the correctness of the District Court's holding, affirmed by the Court of Appeals, that the HENRY M. DAWES would have arrived at the position of the DONALD RAY well before dark set in and while the respondents' decedents were still being circled by DUV BO I, but for the negligent acts and omissions of the Government's shore-based personnel who participated in this operation.

In making its findings of fact, the District Court rejected the findings proposed by the Government. And in affirming

the decree for respondents, the Court of Appeals rejected the Government's contentions that certain of the crucial findings of fact are clearly erroneous. These factual findings are not open for further review here. The question here presented, therefore, is whether the United States is responsible for the deaths of respondents' decedents resulting from the negligent acts and omissions of its employees as found by the District Court and affirmed by the Court of Appeals.

ARGUMENT IN OPPOSITION TO GRANTING THE WRIT

(a)

The Facts as Found by the District Court and Affirmed by the Court of Appeals Entitled Respondents to a Decree

The case was tried and determined in the District Court on the facts. The District Judge accepted the respondents' version of the facts and refused to find, as proposed by the Government, that:

> "No actionable negligence has been proved against any of the Navy or Coast Guard units, afloat, ashore or in the air, with each acting in good faith on the information it had at the time and place of the emergency."
>
> Government's Proposed Conclusion of Law No. 5, R. 985.

Instead, the District Judge specifically found the involved Government personnel negligent in nine respects and concluded that the respondents' decedents drowned as a result of that negligence (R. 1001-1003).

Moreover, the District Judge found, from the evidence,

that had the Government's personnel not undertaken the rescue effort, the decedents' fellow-shrimpers at Mayport would have done so after the DONALD RAY had been located by the Navy plane. So, upon the facts as found by the District Court and affirmed by the Court of Appeals, the essential basis for application of the principles of the Good Samaritan Doctrine was present. Thus, under any view of the law, the facts found by the District Court entitled the respondents to a decree.

(b)

The Position of the Government May Not Be Likened to That of a "Voluntary Rescuer" or "Private Salvor".

It seems obvious that the Government's position may not be likened to that of a "voluntary rescuer" or "private salvor." For this is not a case where a private vessel was diverted from some other purposes to give aid to another vessel in distress. Such was the position of the HENRY M. DAWES but not of the Government. The Government's facilities and personnel were not diverted by the rescue effort; this was the very purpose for which the facilities and personnel of the National Search and Rescue Plan were organized. The Government's participation was "voluntary" only in the sense that the Congress was not under any compulsion to adopt the policy it did adopt; and in the sense that the agencies having responsibility for effectuating the congressional policy had some discretion in respect to the way in which the congressional policy was carried out.

The Government's argument on this phase of the case is fully answered by the opinion of the Court of Appeals to which we add only the further comment that respondents' decedents were intended beneficiaries of the National Search and Rescue Plan. In a broad sense, they were in privity with

the rescue personnel. As citizens and taxpayers of the Government, the respondents decedents were entitled to the services and facilities of the National Search and Rescue Plan within the prescribed limits of availability. They were entitled to have those services rendered with ordinary care and without negligence. Correspondingly, the rescue personnel who were employed by the Government to effectuate that plan were under a duty to use ordinary care and not to negligently commit or omit any act in discharging the duties of their employment.

The Court of Appeals' Decision Does Not Extend the Waiver of Immunity Beyond the Terms of the Statute

The decision in this case is in keeping with and does not extend the Government's waiver of immunity beyond the terms of the Federal Tort Claims Act as construed and applied in *Indian Towing Co.* v. *United States*, 350 U. S. 61, and *Rayonier, Inc.* v. *United States*, 352 U. S. 315, 319.

We have pointed out that the position of the Government here is not the same as or even like the position of a private salvor. It is difficult to imagine a private person who could command facilities, equipment and personnel comparable to those made available by the Government for operation of its National Search and Rescue Plan. In this respect the Government's position is unique. But the uniqueness of the Government's position in this respect does not deprive respondents of the benefits of the waiver made by the Federal Tort Claims Act. This was firmly established by *Indian Towing Co.* and *Rayonier*.

It is not difficult to imagine a contractual arrangement between the Government and private owners of radio stations

planes and vessels which would obligate those private persons to assist in rescue operations when called on, in which unarmed situation those private operators would be liable should their employees be guilty of the negligence of which the Government's employees were guilty in this case.

In *Indian Towing Co.* this Court thought it "not at all inconceivable" that the Government should permit operation of private lighthouses and said:

> we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance — the presence of identical private activity."

350 U. S. 66, 67.

There is No Conflict of Decisions

Liability in this case is bottomed on this Court's decisions in *Indian Towing Co.* and *Rayonier, supra*, and in *United States v. Union Trust Co.*, 350 U. S. 907, affirming 221 F. 2d 462. Excepting *Frank v. United States*, 230 F. 2d 478 (CA3, 1956), which we shall presently discuss, all of the decisions relied on by the Government antedate the *Indian Towing Co.* and *Rayonier* decisions and were by those decisions overruled in so far as they were conflicting with the decisions of this Court.

Although the *Frank* decision postdates *Indian Towing Co.* and *Rayonier*, the opinion is based upon the decision of the same Court in a case which antedated *Indian Towing Co.* and *Rayonier*, *i. e. P. Dougherty Co. v. United States*, 207 F. 2d 626. Very clearly the decision of the Third Circuit in *P. Dougherty Co. v. United States* is inconsistent with and to the extent of such inconsistency was overruled by this Court's decision in *Indian Towing Co.* and *Rayonier*. See *Frank*

note 14 Opinion of Court of Appeals Petition p. 3.

But on the facts the *Frank* case is completely different from the instant case. There the rescue was attempted by a single Coast Guard vessel. And the negligence charged was that the Coast Guard vessel was not in proper condition and was not properly equipped and manned. No specific negligent act or omission on the part of any crew member was charged and the holding of the Court was simply that:

> We have only a diligent rescue effort which proved ineffectual for lack of adequate equipment, preparation or personnel.

250 F. 2d. p. 180.

Liability in the instant case was not predicated upon the lack of or inadequacy of equipment or personnel or upon inadequate training of personnel, nor yet upon the negligence of the crew of any vessel. The liability in the instant case was predicated upon the negligent acts and omissions of the Government's shore-based personnel. Insofar as the decision in the instant case may be inconsistent with any dictum contained in *Frank*, the inconsistent dictum of *Frank* is likewise inconsistent with this Court's decisions in *Indian Towing Co.* and *Rayonier*.

The Supposed Significance of the Court of Appeals' Opinion Does Not Afford a Basis for Granting the Writ

Government counsel assume that the Court of Appeals' opinion will be read as a precedent "for the imposition of liability on the United States for the execution of a myriad of Governmental activities of magnitude in circumstances where a private person would not be held responsible." Petition p. 18.

Of course, the opinion makes no such holding and may not be so read.

Government counsel cite statistics of rescues attempted which were not successful and urge the importance of a review by this Court upon the premise that the holding of the Court below was that "if negligence can be found, the United States can be held liable for simply failing to effect a rescue." Of course, the Court of Appeals did not make such a holding. The Court of Appeals did hold, as did the District Court, that the Government was liable for the deaths of respondents' decedents in this case because those deaths were caused by the negligent acts of employees of the Government acting within the scope of their employment under circumstances where a private person would have been so liable. That is the philosophy of the Federal Tort Claims Act, and the fact that similar negligence by the Government's employees may result in many other deaths and consequent claims can afford no basis for narrowing the settled construction of the Tort Claims Act. For, as said by this Court in *Rayonier*:

> Congress was aware that when losses caused by such negligence are charged against the public treasury they are in effect spread among all those who contribute financially to the support of the Government and the resulting burden on each taxpayer is relatively slight. But when the entire burden falls on the injured party it may leave him destitute or greviously harmed. Congress could, and apparently did, decide that there would be unfair when the public as a whole benefits from the services performed by Government employees.

352 U. S. at p. 320.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Proof of Service

I, CHESTER BEDELL, attorney for the respondents herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of December, 1960, I served a copy of the foregoing Brief on the Petitioner by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

CHESTER BEDELL,
Attorney for Respondents.

81

DAWES 1555

DAWES 1617

DAWES 1736

DAWES 1823

1540

DANGER AREA
Unexploded Ordnance

DONALD RAY 1644
30.06 N 81.05 W

DONALD RAY
REPORTED POSIT
2001 30.04N 80.53W

ASSUMED POSITION
DONALD RAY
30.06N 80.35W

DAWES SIGHTED FLARES
ON WATER 2115
30.00.05 N 80.48 W

SWEET	
1	1534
2	1643
3	1710
4	2000
5	2115
	TOOK

JACKSONVILLE AERO
Rot W & G

(Gp Fl (4) ev 20 sec 8 sm vis 15 M
FR Obstr Lt

Jacksonville Beach

(Gp Fl 10s Fl R Fl W R)

AERO R Bn

AERO Rot W & G

Talbot I.

Johnsons Hill

Johnsons Rd

Rabbit Pt

(Apprx 577)

R Bn Tr

20m 30m & 50m 60m

(Obscd)

Johnsons River

ST AUGUSTINE INLET

St Augustine

Crescent Beach

Summer Haven

LORAN

GENERAL EXPLANATION

FREQUENCY CHANNEL (preceding H)
1.....1950 kc.

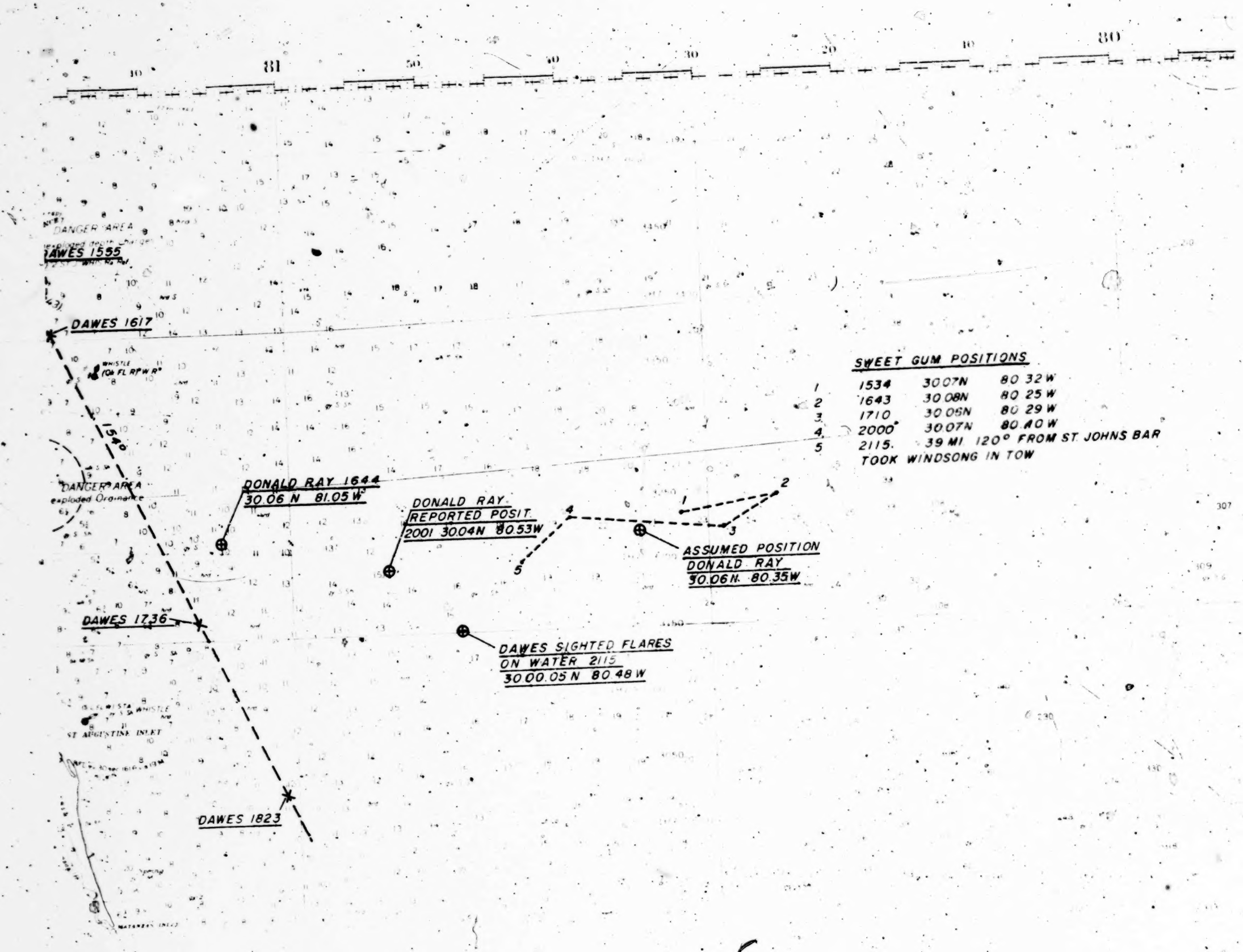
BASIC PULSE RECURRENCE RATE
H (high)..33⅓ pulses per second

SPECIFIC RECURRENCE RATES assigned for station identification (following H)
6, 7

EXAMPLE: 1H6

RATES ON THIS CHART
1H6 · 1H7

CAUTION
Skywaves should not be used in determining loran lines of position on this chart


DANGER AREA
DAWES 1555
DAWES 1617
WHISTLE
FOG FL RP W R°
1540
DANGER AREA
exploded Ordnance
DONALD RAY 1644
30.06 N 81.05 W
DONALD RAY
REPORTED POSIT
2001 30.04N 80.53W
ASSUMED POSITION
DONALD RAY
30.06N. 80.35W
DAWES 17.36
DAWES SIGHTED FLARES
ON WATER 2115
30.00.05 N 80.48 W
ST AUGUSTINE INLET
DAWES 1823
SWEET GUM POSITIONS
1 1534 30.07N 80 32 W
2 1643 30.08N 80 25 W
3 1710 30.05N 80 29 W
4 2000 30.07N 80.40 W
5 2115. 39 MI 120° FROM ST JOHNS BAR
TOOK WINDSONG IN TOW